PD-0399-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/4/2017 1:26 PM
Accepted 10/4/2017 4:48 PM
DEANA WILLIAMSON
CLERK

No. PD-0399-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/5/2017
DEANA WILLIAMSON, CLERK

KENYETTA DANYELL WALKER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Orange County
Cause No. 07-16-00245-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State Prosecuting Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Kenyetta Danyell Walker.

- The trial judge was the Hon. Dennis Powell, Presiding Judge, 163rd District Court, Orange County, Texas.

- Counsel for Appellant at trial was Thomas Burbank, 2 Acadiana Court, Beaumont, Texas 77706.

- Counsel for Appellant before the court of appeals was Christine Brown-Zeto, 1107 Green Avenue, Orange, Texas 77630, and has been allowed to withdraw.

- On August 30, 2017, this Court ordered that the trial court appoint new counsel for Appellant before this Court if Appellant is indigent and not currently represented.

- Trial counsel for the State at trial and on appeal before the court of appeals was Krispen Walker, Orange County District Attorney's Office, 801 Division Street, Orange, TX 77630.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes, Codes, and Rules

No. PD-0399-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

KENYETTA DANYELL WALKER, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals was first to notice the State had charged a nonexistent offense. It erroneously called this "jury charge error" and remanded for new trial. The court erred in not reforming the judgment to a valid lesser included offense since the evidence proved—and the jury necessarily found—all the elements of that offense.

STATEMENT OF THE CASE

Appellant was indicted and convicted of engaging in organized criminal activity (EOCA) with a predicate offense—possession with intent to deliver—that

offense is not listed in the statute. CR 4, 20. The court of appeals rejected Appellant's claim that the evidence was insufficient, but held that the error resulted in reversible charge error and remanded for a new trial. *Walker v. State*, No. 07-16-00245-CR, 2017 Tex. App. LEXIS 2817 (Tex. App.—Amarillo Mar. 30, 2017) (not designated for publication). This Court granted an extension of time to file the State's brief in this matter on or before October 9, 2017.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

ISSUE PRESENTED

Can a conviction for a charged, but nonexistent, offense be reformed to a subsumed and proven offense that does exist?

STATEMENT OF FACTS

Law enforcement had been investigating drug activity at the house where Appellant lived with her two daughters and a man nicknamed "Pill." 6 RR 9-10, 19, 94-95. Another man, Brian Gant, sometimes stayed there. 5 RR 106; 6 RR 79. People known to police had been making short, frequent stops at the house when Appellant was believed to be present. 6 RR 78-79. On two occasions, a confidential informant

purchased marijuana and synthetic marijuana there. 6 RR 96-97.

One night a group of out-of-town intruders busted in the front door. 5 RR 59, 63, 69-70, 88, 94; SX 17. Appellant engaged them in a gunfight that left one of the intruders dead on the lawn. 5 RR 21, 47-48; 6 RR 131, 163, 179; SX 4, 74. The downed man's compatriots abandoned him when they could not lift him into the car, and drove off. 5 RR 71. Gant was also shot. 6 RR 227.

Appellant's surveillance cameras outside the house showed that, after the shootout but before police arrived, Appellant made several trips outside, first to carry a bag out to an Infiniti parked outside, then to spray Febreze in the air, and finally to hand a pistol to "Pill," who (before leaving the scene) went over to the dead man on the lawn and hit him. 5 RR 30, 73; 6 RR 19-21, 86-88; SX 70. Inside the house, police discovered controlled substances and paraphernalia in such quantities and varieties that it was considered a "major distribution point."[1] 5 RR 50, 87; 6 RR 70. The bag Appellant took out to the Infiniti contained more than 400 grams of

[1] The odor of raw marijuana in one room was so strong it made the police lieutenant's eyes water. 6 RR 39. They identified what they believed to be cocaine, blue vials of PCP, Xanax, and codeine cough syrup in a baby bottle, along with digital scales, resealable plastic bags, and a drawer of small denomination bills. 6 RR 33-52; SX 47, 49-50, 64, 66.

dihydrocodeinone pills. 5 RR 77, 80-83; 6 RR 57, 191; SX 19-23, 80-82, 85.

The State charged Appellant with engaging in organized criminal activity (EOCA). CR 5. That offense requires (1) having the intent to establish, maintain, or participate with a group of three or more criminal collaborators, and (2) committing a predicate offense named in the statute. TEX. PENAL CODE § 71.02(a)(1)-(18). The predicate offense that the State named in its indictment—possession of the dihydrocodeinone pills with intent to deliver—is not one of the named predicates.[2] TEX. HEALTH & SAFETY CODE §§ 481.104(a)(4) (penalty group 3 substance), 481.114(e) (possession with intent to deliver substance in penalty group 3).

At trial, the jury was instructed on EOCA and a lesser of simple possession. CR 61, 64. On appeal, Appellant raised sufficiency but did not challenge the lack of a qualifying predicate offense. *See* Appellant's Court of Appeals Brief, at p.17-18. To its credit, the court of appeals noticed the problem and requested supplemental briefing. *See* Seventh District Court of Appeal's Feb. 28, 2017 letter to the parties.

---

[2] The original indictment alleged simple possession as the predicate and then was amended to possession with intent to deliver. CR 4 (docket sheet indicating indictment was interlineated), CR 5 (original indictment), CR 20 (State's motion to amend); 2 RR 4 (granting amendment and interlineating). Neither offense qualifies. *See* TEX. PENAL CODE § 71.02(a)(5).

In its opinion, the court first measured the evidence against the indictment and rejected Appellant's sufficiency claim. *Walker*, 2017 Tex. App. LEXIS 2817, at *4. It then framed the predicate issue as unassigned jury charge error and remanded the case for a new trial without specifying the offense to be retried. *Id.* at *7-8.

SUMMARY OF THE ARGUMENT

On finding that the State charged Appellant with engaging in an organized criminal activity by committing a felony that was not a predicate felony, the court of appeals should have acquitted Appellant of EOCA for insufficient evidence, not remanded for a new trial. Even characterizing the error as jury charge error, however, the court of appeals under this Court's recent decision in *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017) should have reformed the judgment to the felony that the State did prove and remanded for resentencing.

ARGUMENT

I. The error in the case is evidentiary sufficiency.

A. There was no evidence of an element.

Here, the State offered no evidence of the qualifying-predicate-offense element of EOCA. Indeed, on this record, it could never have done so. While possession of a controlled substance can be a predicate if committed "through

forgery, fraud, misrepresentation, or deception," TEX. PENAL CODE § 71.02(a)(5), that was not how this offense was committed. Appellant and the two men were running a major drug house; other than the inherent deception of avoiding detection by police, there was no evidence Appellant misrepresented anything or deceived her suppliers in acquiring or keeping control over the dihydrocodeinone.

Delivery of marijuana might qualify as a predicate for EOCA,[3] but that was not the predicate specified in the indictment. Even if it were, the evidence was insufficient to sustain a conviction for first-degree-felony EOCA based on delivery because the evidence of the confidential informant's purchases of marijuana and synthetic marijuana do not specify the amount purchased.[4] 6 RR 96-97.

Without evidence of a qualifying predicate offense, Appellant should have

---

[3] TEX. PENAL CODE § 71.02(a)(5); TEX. HEALTH & SAFETY CODE § 481.002(5) (substances listed in Schedule I are "controlled substance[s]"); *Whitaker v. State*, 572 S.W.2d 956, 956 (Tex. Crim. App. 1978) (marijuana is a Schedule I controlled substance).

[4] Appellant was convicted of first-degree-felony EOCA, with a 15-year minimum, TEX. HEALTH & SAFETY CODE §§ 481.104(a)(4) & 481.114(e); TEX. PENAL CODE § 71.02(b)(3). An equivalent EOCA conviction predicated on delivery of marijuana would require evidence that the informant left the house with more than 50 pounds of marijuana. *See* TEX. HEALTH & SAFETY CODE § 481.120(b)(5).

been acquitted of EOCA. *See Fiore v. White*, 531 U.S. 225, 228-29 (2001) (a conviction for conduct that a "criminal statute, as properly interpreted, does not prohibit. . . violates due process."); *Ex parte Perales*, 215 S.W.3d 418, 420 (Tex. Crim. App. 2007) (rendering acquittal on habeas where indictment alleged actual transfer to unborn child, which, as a matter of law, could not constitute delivery).

B. The court of appeals's sufficiency analysis ignores Malik.

Although the court of appeals cited the proper standard for reviewing sufficiency of the evidence—including the requirement that the trier of fact find the elements beyond a reasonable doubt[5]—it failed to apply that standard. Instead, it held that "legally sufficient evidence supports the conviction, *as charged*," and went on to explain that there was evidence to conclude Appellant had the intent to participate in a combination and possessed a controlled substance with intent to deliver. *Walker*, 2017 Tex. App. LEXIS 2817, at *3-4 (emphasis added). While this may have been responsive to the specific sufficiency claims Appellant raised on appeal, proof of a non-predicate offense could not establish all the elements of

[5] A conviction based upon a record wholly devoid of any evidence of a crucial element of the offense charged is constitutionally infirm. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (citing *Thompson v. Louisville*, 362 U.S. 199 (1960)).

EOCA.

Under *Malik v. State*, sufficiency of the evidence should not be measured by the jury charge actually given but by the elements as set out in a hypothetically correct charge. 953 S.W.2d 234, 239 (Tex. Crim. App. 1997). As the court of appeals acknowledged, a proper charge would not have omitted the "statutorily designated predicate offense" element. *Walker*, 2017 Tex. App. LEXIS 2817, at *7. Having reasoned this far, the court of appeals should have gone on to find the evidence insufficient to prove that element and acquitted Appellant of EOCA.

II. No matter the label for the error, policy requires reformation.

A. A proper sufficiency analysis would have led the court to reform the judgment.

Upon finding insufficient evidence to support a conviction for a greater offense, courts of appeals must determine whether to reform the judgment to a lesser offense—regardless of whether it was requested or included in the jury charge. *Lee v. State*, No. PD-0880-16 (Tex. Crim. App. Oct. 4, 2017); *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012); TEX. R. APP. P. 43.6 (permitting the court of appeals to enter "any other appropriate order that the law and the nature of the case require."). If the evidence is sufficient to support every element of the lesser-included offense and the jury necessarily found every such element in its conviction

for the greater, a court of appeals is required to reform the verdict to show a conviction for the lesser. *Thornton v. State,* 425 S.W.3d 289, 300 & n.55 (Tex. Crim. App. 2014). To do otherwise would usurp the jury's factual determinations. *Bowen*, 374 S.W.3d at 432.

Once the court of appeals found insufficient evidence of EOCA, reforming the verdict to the lesser offense that the State did prove—possession of dihydrocodeinone with intent to deliver—is the required next step. *Hart v. State,* 89 S.W.3d 61, 66 (Tex. Crim. App. 2002).

B. Even if jury charge error, remand for new trial is not the proper remedy.

Even though more properly phrased as an error of sufficiency or no evidence,[6] the proper remedy for this "charge error" is still reformation.

In *Burks v. United States,* the United States Supreme Court considered under what circumstances a case could be remanded after reversal on appeal, consistent with the Double Jeopardy Clause. 437 U.S. at 14. The Court drew a line between trial errors (which jury charge error would typically fall into) and evidentiary

---

[6] In an insufficient evidence case, the case should never have been submitted to the jury; there should not have been a jury charge in the case. *Burks v. United States,* 437 U.S. 1, 16 (1978); *Malik*, 953 S.W.2d at 237.

insufficiency. *Id*. at 16. Unlike sufficiency, the Court reasoned, typical trial errors imply nothing with respect to the guilt or innocence of the defendant. *Id*. Retrial in that circumstance makes sense because the accused still has a strong interest in a readjudication of guilt that is free from error, and society has a concern for ensuring the guilty are punished. *Id*.

This does not hold true for the "trial error" in this case—it implicates guilt or innocence. As the court of appeals observed multiple times, the charge permitted the jury to convict Appellant for something that was not a crime. *Walker,* 2017 Tex. App. LEXIS 2817, at *7 ("the charge permitted the jury to convict appellant for committing an offense outside the scope of § 71.02(a)"); *id*. at *8 ("Charge error permitting a jury to convict someone for acts outside the expressed language of a penal provision cannot but 'affect the very basis of the case'…"). Society has no interest in retrying Appellant for first-degree-felony EOCA with possession with intent to deliver as a predicate; that error cannot be factually remedied on retrial.

C. Arteaga v. State indicates reformation is proper.

Notwithstanding the jeopardy problem presented by the court of appeals's approach, reformation is still appropriate for the "charge error" in this case. In *Arteaga v. State*, this Court held—after the court of appeals had already issued its

opinion here—that reformation to a lesser-included offense is sometimes appropriate for erroneous jury charge error. 521 S.W.3d 329, 340 (Tex. Crim. App. 2017). This Court found that the first-degree-felony-offense enhancement for sexual assault, when the victim is a person the defendant is prohibited from marrying, applies only when bigamy law would prohibit a marriage. *Id*. (interpreting TEX. PENAL CODE § 21.011(f)). The jury charge, however, permitted the jury to find the enhancement under a broader meaning of when marriage was prohibited, including incest. *Id*. The Court explained that "the jury was allowed to find Arteaga guilty of first-degree felony sexual assault of a child even though the State had not proven an element of the offense (and could not have done so based on the evidence)." *Id*. In reforming the conviction to second-degree-felony sexual assault, this Court reasoned:

> if the harm suffered a defendant due to charge error can be remedied by a different, less drastic remedy, similar to our reasoning in *Bowen* regarding acquittals, then a defendant should not get the windfall of a new trial at the expense of usurping the role of the factfinder.

Id. at *24. Here, the same result should follow. Thus, remand for a new trial is not only unfair to the defendant, it is unfair to the State.

III. Reformation is appropriately applied here.

A. Possession with intent to deliver is a valid lesser.

Here, the court of appeals should have reformed the judgment to reflect a conviction for possession of more than 400g of dihydrocodeinone with intent to deliver. The statutorily enumerated predicate offenses are lesser-included offenses of EOCA since they are "established by proof of the same or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PROC. art. 37.09(1); TEX. PENAL CODE § 71.02(a); *see Garza v. State*, 213 S.W.3d 338, 351 (Tex. Crim. App. 2007) (finding only difference between EOCA and predicate offense is commission of predicate as a gang member). Thus, when the evidence is insufficient to support a conviction for EOCA but sufficient to support the predicate offense of theft, for example, this Court has reformed the judgment to the predicate offense. *Hart*, 89 S.W.3d at 66 .

Although possession with intent to deliver is not a predicate offense of EOCA, it was also established by proof of all the "elements" charged in this case except the intent to establish, maintain, or participate in a combination. TEX. PENAL CODE § 71.02. Consequently, it should be treated like a lesser-included offense. The indictment shows that possession was entirely subsumed within the other:

> [Appellant] did then and there intentionally and knowingly possess [with intent to deliver] a controlled substance, to wit Dihydrocodeinone, hydrocodone with one or more active nonnarcotic ingredients, in an amount by aggregate weight including adulterants and dilutants, of 400 grams or more
>
> And the defendant did then and there commit said offense with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity.[7]

CR 5. As with a lesser, Appellant was on notice that she could be convicted of the possession offense. *See Hall v. State*, 225 S.W.3d 524, 532 (Tex. Crim. App. 2007) (explaining that a necessarily included lesser provides notice of that charge).

Also, a prosecutor has authority to abandon elements and prosecute the defendant for a lesser-included offense. *See Grey v. State*, 298 S.W.3d 644, 651 (Tex. Crim. App. 2009) (citing *Eastep v. State*, 941 S.W.2d 130, 134 (Tex. Crim. App. 1997)). If the State could have abandoned the paragraph alleging the element of intent to establish, maintain, or participate in a combination—or even in a case with a proper indictment, could have abandoned the intent element of EOCA and a properly pled allegation of possession through forgery, fraud, or deception—it

---

[7] The way the indictment was laid out, with the possession offense set out first followed by the intent element for EOCA in a separate paragraph, is similar to the pattern of setting out the principle offense followed by an enhancement.

follows that the court of appeals, in finding no evidence of EOCA, should have struck that paragraph and reformed the conviction to the lesser alleged. The result should not be any different simply because possession with intent to deliver never could have been part of the State's proof of EOCA.

B. The evidence was sufficient to prove possession with intent to deliver.

Reformation was appropriate under *Thornton* and *Bowen* because the jury necessarily found all the elements of possession with intent to deliver (having found Appellant guilty of those elements *and* the intent to establish, maintain, or participate in a combination, CR 64) and the evidence is sufficient to support that offense.

The court of appeals acknowledged the evidence permitted the jury to conclude that "appellant possessed the quantity of hydrocodone alleged in the indictment with intent to deliver." *Walker*, 2017 Tex. App. LEXIS 2817, at *4. The record supports that finding. Possession with intent to deliver requires proof that Appellant exercised care, custody, control, or management over the controlled substance, knowing it was contraband, with intent to deliver it to another. TEX. HEALTH & SAFETY CODE §§ 481.002(a)(38) (defining "possession"), 481.114(a) (setting out elements); *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (listing elements including mental state). Appellant exercised custody and control

over the hydrocodeinone by carrying it out to the Infiniti under circumstances suggesting she was shielding it from discovery by police. *See Hattersley v. State*, 487 S.W.2d 354, 356 (Tex. Crim. App. 1972) (marijuana in bag defendant checked at airport sufficient to prove bag was defendant's and that he possessed the contraband inside). That she attempted to conceal it evidenced her knowledge that it was contraband. Further, the quantity of pills inside the plastic bag—numbering in the hundreds—as well as the fact that Appellant was operating a drug house that attracted the attention of criminals willing to drive some distance to rob it ultimately established that Appellant harbored the intent to distribute the pills.

IV. Conclusion

In sum, the error that the court of appeals discovered went further than the court's remedy of retrial would address. In simplest terms, this was a case of insufficiency. But even as jury charge error, the usual remedy of remand is inappropriate in this case. The jury necessarily found all the elements of the alleged predicate felony offense. While the evidence could not establish EOCA, the jury's verdict that Appellant was guilty of the felony offense—possession with intent to deliver—should be honored. All that is left is remand for a new punishment hearing.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reform the judgment to possession of a controlled substance with intent to deliver (or, alternatively, remand to the court of appeals for reformation) and remand to the trial court for new punishment proceedings.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,115 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of October 2017, the State's Brief was served on the parties below as indicated:

The Honorable Krispen Walker
Assistant District Attorney
Orange County District Attorney's Office
kwalker@co.orange.tx.us
Via email/e-service

Kenyetta Walker
Appellant, TDCJ No. 02084438
1916 North Hwy. 36 Bypass
Gatesville, Texas 76596
Via U.S. Mail

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney